United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7583

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

V/O EXPORTKHLEB,

Plaintiff-Appellant,

against

P/S

AMTORG TRADING CORPORATION, TEXAS TRANSPORT & TERMINAL CO., INC., M/V CONSTANTIA and CHRISTIAN F. AHRENKIEL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, CHRISTIAN F. AHRENKIEL

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Statement

This is another claim for alleged shortage and damage to a cargo of grain.

Plaintiff, V/O Exportkhleb, the Soviet government grain importing corporation, was the consignee of the grain carried from Philadelphia to the U. S. S. R. in 1973. The shipper, Continental Grain Export Corp., had originally been named as a plaintiff, but was subsequenlty dropped as a party to this action. Defendant, Amtorg Trading Corporation, the Soviet trading headquarters in New York, was the general agent for Sovracht, the Soviet government chartering corporation and the contract carrier which had subchartered the vessel from another charterer. The vessel owner was defendant Ahrenkiel. Texas Trans-

port & Terminal Co., Inc. was Sovracht's agent at Philadelphia.

For obvious reasons, Sovracht was not named in the suit and Amtorg was never served, since it would then present the Court with the ludicrous spectacle of the Russian government suing itself in a U. S. Court. The vessel was never arrested nor was a claim of owner ever filed.

This is an appeal from an order of the District Court for the Southern District of New York dismissing the complaint against the remaining parties on the following grounds:

1. Against defendant Ahrenkiel on the grounds of insufficiency of service of process, lack of *in personam* jurisdiction, and time bar (A41-A42).

2. Against defendant Texas Transport & Terminal Co., Inc. on the grounds that it acted solely as an agent for a disclosed principal, namely, Sovracht, not Ahrenkiel (A45).

3. Against defendant Amtorg Trading Corporation on the grounds of lack of prosecution (A46).

This brief will deal only with the dismissal of the action against defendant Ahrenkiel, the vessel owner. The facts are not in dispute (A47), and have been recited with perfect clarity by Judge Haight in his opinion (A37-A41). Accordingly, no useful purpose would be served by repetition.

POINT I

Ahrenkiel was never served.

No attempt to serve Ahrenkiel was made until approximately fourteen months after suit was filed (A1), apparently under Magistrate Schrieber's prodding (A11-

A12). Only then, on March 25, 1976, did plaintiff attempt to create a color of service by delivering a copy of the complaint in New York to TTT Ship Agencies, Inc., the successor company to defendant Texas Transport & Terminal Co., Inc..

Putting aside for the moment the question of whether or not Texas Transport & Terminal Co., Inc. was ever Ahrenkiel's agent, and the fact that service absent a jurisdictional predicate cannot create jurisdiction, *McGee* v. *International Life Insurance,* 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); *International Shoe Co.* v. *State of Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1954), we have a record which is totally devoid of any proof that TTT Ship Agencies, Inc. was Ahrenkiel's agent when service was attempted. Ahrenkiel says it was not (A15). TTT Ship Agencies, Inc. says it was not (A4-A6). In fact, no one, not even plaintiff or its attorney, so much as claims that TTT Ship Agencies, Inc. was Ahrenkiel's agent at that time. And, it is plaintiff's burden, not only to allege (which it has failed to do), but to prove the agency relationship on that date.

> "It is well settled that the burden 'rests upon the plaintiff to sustain the elements upon which rests the validity of the service he has effected.' Klishewich v. Mediterranean Agencies, Inc., supra, 1967 AMC at 843, 42 F.R.D. at 625; Kelley v. Three Bays Corp., 1959 AMC 1854, 173 F. Supp. 835 (SDNY, 1959), aff'd on opinion below, 1960 AMC 2334, 276 F. 2d 958 (2 Cir., 1960)."
>
> *Ins. Co. of North American* v. *S.S. Jotina,* 1974 AMC 1190, 1192-1193 (SDNY, 1974) not otherwise reported.

The only thread upon which any claim of an agency relationship could hang is the authorization of Texas Transport & Terminal Co., Inc. by the Master of the M.V. CONSTANTIA in 1973 to sign bills of lading on his behalf for

the subject voyage (A20). However, an authorization to perform one simple clerical act does not create a general agency. *Italia Assicurazoni S.P.A. et al.* v. *S.S. St. Olga,* 1974 AMC 2209, 2210-2211 (SDNY, 1974), not otherwise reported. And in any event, there is no basis for assuming its continuation for three years after that single clerical act was performed. *Klishewich* v. *Mediterranean Agencies, Inc.,* 42 F.R.D. 624, 627 (EDNY, 1966). Accordingly, Ahrenkiel was never served.

> ". . . when the person served is not the agent of the respondent at the time of the attempted service of process, the attempted service is ineffectual."
>
> *Granite Chemical Corp.* v. *Northeast Coal & Dock Corp.,* 249 F. Supp. 597, 598 (D. Maine, 1966).

POINT II

There could be no *in personam* jurisdiction of defendant Ahrenkiel in the U. S. District Court for the Southern District of New York.

This case does not involve a transaction of business within the Southern District of New York, or within the State of New York. Plaintiff has neither made, nor attempted to make, any showing that defendant Ahrenkiel is doing business here. Ahrenkiel is a resident of West Germany and has no other place of business. Furthermore, it is quite clear that the service (the signing of the bill of lading) to be performed by Texas Transport & Terminal Co., Inc. was to take place only in Philadelphia (A20). And even if an authorization to sign bills of lading could be deemed to create a general agency, which is denied, it is equally clear that the maintenance by an agent of an office in New York cannot create jurisdiction over the principal for services performed in another port. *Asheraft-Wilkinson Co.* v. *Companhia de Navegacion Geamar, S.R.L.,* 117 F. Supp. 162, 163 (SDNY, 1953).

Of course, to reach this far, one would have to assume that the master's authorization to sign his bills of lading created a general agency relationship between Ahrenkiel and Texas Transport & Terminal Co., Inc.; that it amounted to Ahrenkiel's doing business in Philadelphia; that the relationship and the doing business continued for three years after the bills of lading were signed; and that defendant Ahrenkiel could still be considered as doing business in Philadelphia through TTT Ship Agencies, Inc. on March 25, 1976. None of this was found by the Court nor can it be found in the record. Plaintiff never made any attempt in the District Court, or in this Court to show that Ahrenkiel was subject to suit in New York.

> "The burden of showing the basis of jurisdiction in this court is on the plaintiff and he has utterly failed to sustain it."
>
> *Ins. Co. of North America* v. *S.S. Jotina*, 1974 AMC 1190, 1195, not otherwise reported.

POINT III

The action is time barred against defendant Ahrenkiel.

In view of the fact that no service was ever effected nor jurisdiction obtained over defendant Ahrenkiel, the question of time bar may not be reached by this Court. It was asserted by defendant Ahrenkiel in its motion in the District Court to avoid any question of a waiver of the defense under Rule 12(g) of the Federal Rules of Civil Procedure. Judge Haight cited it as a further reason for the dismissal and plaintiff charges error in this respect.*

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* Curiously, plaintiff's brief cites this as the sole error below with respect to defendant Ahrenkiel. Apparently, plaintiff agrees that Ahrenkiel was never served and that he is not subject to in personam jurisdiction as found by Judge Haight (A42). On these grounds alone, the decision of the District Court must be affirmed.

The cargo which is the subject of this suit was delivered on or about July 16, 1973 (A13 and A23). Suit was commenced on January 17, 1975 (A1) and on its face the claim is time barred under the controlling one year statute of the Carriage of Goods by Sea Act, 46 U.S.C.A. 1303(6). Plaintiff, however, claims that it was granted extensions of time within which to commence suit against defendant Ahrenkiel up to and including January 19, 1975. It is these alleged extensions of suit time, which are the touchstones of this issue. They consist of two letters from R.F. Randall, Ltd., the plaintiff's underwriter's representative, to Texas Transport & Terminal Co., Inc. The bodies of the two letters are identical, except as to the extended date, and read as follows:

> "On behalf of our principals we have filed claim with you for loss and/or damages in the captioned shipment.
>
> We would ask you to confirm extension of the time in which suit may be brought in the matter, to and including (October 17, 1974), (January 19, 1975) by signing and returning to us the attached copy of this letter. It is understood that your agreement to extend the time in which to sue places us in no better position than we would be had we commenced suit today." (A21; A23).

The copy letters were signed and returned to R. F. Randall, Ltd. by Texas Transport & Terminal Co., Inc. on July 18, 1974 and October 24, 1974. Neither letter mentions defendant Ahrenkiel nor indicates that a claim is being directed against anyone other than Texas Transport & Terminal Co., Inc. as a principal. Nor in confirming the extension requests, did Texas Transport & Terminal Co., Inc. indicate that it was acting for anyone but itself.

Plaintiff claims that these extensions bind defendant Ahrenkiel because in June of 1973 the Master of the M.V.

CONSTANTIA had authorized Texas Transport & Terminal Co., Inc. to sign bills of lading on his behalf for the grain loaded on that voyage. It is an incredible position.

The claim made by R.F. Randall, Ltd. was not directed against Texas Transport & Terminal Co., Inc., as an agent, but as a principal, and it was acknowledged as such. Any lingering doubt is erased by the fact that plaintiff has sued Texas Transport & Terminal Co., Inc. as a principal. All this, of course, with full knowledge that the bills of lading were signed by Texas Transport & Terminal Co., "By authority of the master."

Since it could not deny these basic facts, plaintiff then goes on to claim that Ahrenkiel is estopped from denying an agency relationship since it did not repudiate it. The key to this argument, of course, is that Ahrenkiel had to know what was going on when the extensions were granted. Since the record is completely barren of any evidence of such notice, plaintiff's attorney chooses to assume such knowledge at page 11 of his brief. But even assuming that Texas Transport & Terminal Co., Inc. had sent Ahrenkiel actual copies of the extensions (which it did not) no action would be required. The extensions were addressed to Texas Transport & Terminal Co., Inc. as a principal, and confirmed by it as a principal. It did not purport to involve anyone else, and cast no duty on Ahrenkiel.

There were then no extensions granted by or on behalf of defendant Ahrenkiel, and thus the claim is time barred as to him.

CONCLUSION

The complaint was properly dismissed against defendant Ahrenkiel.

Respectfully submitted,

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Due and timely service of TWO copies of the within BRIEF is hereby admitted this 8TH day of FEBRUARY 1977

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by

ATTORNEYS FOR DEFENDANT-APPELLEE
TEXAS TRANSPORT & TERMINAL